IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CIVIL REVISION APPLICATION No 1896 of 1998

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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HARSHADBHAI ZINABHAI DESAI

Versus

BHAVNABEN HARSHADBHAI DESAI

Appearance:

Mr. Utpal M.Panchal for M/S.VYAS ASSOCIATES for Petitioner.

MR RS SANJANWALA for the Respondent.

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 04/09/2002

ORAL JUDGEMENT

1. Rule returnable today. Learned Advocate Mr. R.S. Sanjanwala appears for and waives service on behalf of the respondent.

2. The present Revision Application arises from the order dated 16th May, 1992 made by the learned Assistant

Judge, Valsad, below application Exh.14 in Guardianship Application no.13/1991. The petitioner before this Court is the father of the minor child, and the opponent in the said Application no.13/1991.

3. The petitioner herein is residing at Dadra in the Union Territory of Dadra and Nagar Haveli. The respondent herein, the applicant in the Application no.13/1991 (hereinafter referred to as the applicant), is the wife of the petitioner. The dispute is as regards the guardianship of the minor child ` Roshni '.

4. The petitioner a resident of Dadra, and the applicant a resident of Umargaon, District Valsad, were married in the year 1980. The minor child `Roshni' was born in the month of December, 1989 at Umargaon. After her birth, the applicant alongwith the minor child `Roshni' went to Dadra to reside with her husband-the father of the minor child `Roshni'. However, soon thereafter, they were estranged. The applicant left her matrimonial house and went back to reside with her parents at Umargaon. The minor child `Roshni' remained in the custody of her father at Dadra.

5. The applicant moved the above referred Guardianship Application no.13/1991 under Section 25 of the Guardians and Wards Act,1890 (hereinafter referred to as "the Act"), in the District Court, Valsad. The applicant claimed that after she went at her matrimonial house alongwith the child `Roshni', she was ill-treated by her husband and his family members. She was driven out of her house at Dadra and was compelled to go to reside with her parents at Umargaon. She was not allowed to take the child `Roshni' alongwith her. Thus, she was forcibly deprived of the custody of the child `Roshni'. She prayed that she be given the custody of the child `Roshni'. Pending the said Application no.13/1991, the petitioner-opponent, moved application Exh.14. The petitioner challenged the jurisdiction of the District Judge, Valsad to entertain the said application and prayed for decision on the issue as a preliminary issue. The learned Judge rejected the said Application Exh.14 under the impugned order dated 16th May,1992. The learned Judge was pleased to hold that the ward in question being a child of tender age, her custody was required to be given to the mother. The mother was residing at Umargaon, the ward in question should be deemed to have her ordinary residence at Umargaon, that is, within the territorial jurisdiction of the District Court, Valsad. The District Court, Valsad, therefore, had the jurisdiction to entertain the said Application

no.13/1991.

6. Feeling aggrieved, the petitioner-opponent has preferred the present Revision Application. It would not be out of place to mention here that initially the impugned order was challenged before this Court in Appeal From Order, however, it was held that the Appeal From Order, in the subject matter, was not maintainable. Therefore, the present Revision Application.

7. Mr. Panchal has submitted that the Application no.13/1991 has been preferred under Section 25 of the Act. Section 9 of the Act requires that such application shall be made to the District Court having jurisdiction in the place where the minor ordinarily resides. In the present case, indisputably, the minor `Roshni' resides with the father at Dadra which is her natural residence also. The minor `Roshni' therefore, can be said to be ordinarily residing at Dadra which is beyond the territorial jurisdiction of the District Court, Valsad. The District Court, Valsad, therefore, shall have no jurisdiction to entertain the Application no.13/1991. Mr. Panchal, in support of his argument, has relied upon the judgments in the matters of SM. VIMALABAI W/O BABURAO KSHIRSAGAR V. BABURAO SHAMRAO KSHIRSAGAR (A.I.R. 1951 NAGPUR 179); BHAGYALAXMI AND ANOTHER V. K. NARAYANA RAO (A.I.R. 1983 MADRAS 9); and HARIHAR PERSHAD JAISWAL V. SURESH JAISWAL AND ORS.(A.I.R. 1978 ANDHRA PRADESH 13).

8. The learned Advocate Mr. Sanjanwala has contested the Revision Application, and has supported the impugned order. In support thereof, he has relied upon the judgments in the matters of K.C.SASHIDHAR V. SMT. ROOPA (A.I.R. 1993 KARNATAKKA 120); BHAGYALAXMI AND ANOTHER V. K.NARAYANA RAO (A.I.R 1983 MADRAS 9); KONDUPARTHI VENKATESHWARLU AND ORS. V. RAMA VARAPA VIROJA NANDAN AND ORS.(A.I.R. 1989 ORISSA 151); and HARICHAND RATANCHAND V. VIRBALA W/O HARICHAND RATANCHAND AND ORS. (A.I.R. 1973 GUJARAT 1).

9. Section 25 of the Act empowers a guardian to claim custody of his or her ward if such ward leaves or is removed from the custody of the guardian. Section 9(1) of the Act provides for the jurisdiction of the Court in which the application with respect to the guardianship of the person of the minor should be made. The said Section 9(1) reads as under:

"If the application is with respect to the guardianship of the person of the minor, it shall be made

to the District Court having jurisdiction in the place where the minor ordinarily resides."

9.1 The words " District Court " are defined in Section 4(4) of the Act as under:

" " District Court" has the meaning assigned to that expression in the Code of Civil Procedure, and includes a High Court in the exercise of its ordinary original civil jurisdiction."

10. It is not in dispute that the minor `Roshni' has been residing with her father-the petitioner herein, at Dadra ever since she had been carried by her mother to Dadra, soon after her birth. It is also not in dispute that Dadra is beyond the territorial jurisdiction of the District Court, Valsad. It is also not in dispute that the applicant- the mother of the minor `Roshni' resides at Umargaon. The only question that arises for my consideration is whether the reasoning adopted by the Court below are sound, and whether the minor `Roshni' can be said to have been ordinarily residing at Umargaon as held by the Court below. The words " ordinarily resides" occurring in Section 9(1) of the Act are too general a term which can be given an exhaustive or a precise definition. The meaning of the words " ordinarily resides" is required to be culled from the various rulings of the Courts.

11. In the matter of K.C.SASHIDHAR (supra), the Karnatakka High Court has held that, "invariably, a minor child, that too at the age of 10 to 11 months is expected to be with the custody of the mother. So, the words "ordinarily resides", should be construed as the place where the mother resides before the presentation of the petition." In the matter of BHAGYALAXMI AND ANOTHER (supra), the mother alongwith the three minor children had left the matrimonial house to reside with her parents. In an application for custody, made by the father, the Court held that, the words " ordinarily resides" would in my view connote, a regular, normal or settled home and not a temporary or forced one to which a minor might have been removed either by stealth or by compulsion. The place of residence at the time of filing of the application under the Act, does not help to ascertain whether a particular Court has jurisdiction to entertain the proceedings or not, as it would be easy to stifle proceedings under the provisions of the Act by the mere act of moving the minors from one place to another and consequently from one jurisdiction to another. The

question whether the minors were ordinarily residing, in any particular place has to be primarily decided on the facts of the particular case. The paternal family house or the family residence may normally be taken to be the place of ordinary residence of the minors as well. .... It has also to be borne in mind that mere temporary residence or residence by compulsion at a place however long, cannot be equated to or treated as the place of ordinary residence. Similar is the view expressed by the Orissa High Court in the matter of KONDUPARTHI VENKATESHWARLU (supra). The Court has held that residence by compulsion at a place however long, cannot be treated as a place of ordinary residence.

12. Relying on these judgments, Mr. Sanjanwala has submitted that, at the relevant time, minor `Roshni', was a child of very tender age. Ordinarily she would remain in the custody of the mother-the applicant. But for the restraint by the petitioner, the applicant would have carried the minor `Roshni' with her to Umargaon. In that case, Umargaon would have been the place of residence of minor `Roshni'. Umargaon, therefore, should be treated as a place of ordinary residence of minor `Roshni'. Umargaon is admittedly situated within the territorial jurisdiction of the District Court, Valsad. The Court at Valsad therefore, has the jurisdiction to entertain the application made by the applicant-mother.

13. In the matter of VIMLABAI (supra), the High Court at Nagpur held that: " Under the Hindu law, the father is the natural guardian of his children and his children must be deemed to reside where he resides. .... It follows therefore that his children must also be deemed to reside at the place where he happens to reside." In the matter of HARIHAR PERSHAD (supra), the Andhra Pradesh High Court has held that: "If the expression " place of ordinary residence" means the residence of his natural guardian, the very purpose of using the words " the residence of the minor in S.9(1) would be lost. It is not the place of residence of the natural guardian that gives the jurisdiction to the Court under S. 9(1) but it is the place of ordinary residence of the minor and the Legislature has designedly used the words " Where the minor ordinarily resides." Hence the actual residence of the minor, having regard to the circumstances under which the minor happens to reside at a particular place must be taken into consideration in deciding the place where the minor ordinarily resides."

14. The judgment in the matter of VIMLABAI (supra), has been dissented from by this Court in the matter of

VIRABALA AND ORS. V. SHAH HARICHAND RATANCHAND (supra). For the same reasons, the judgment of the Karnatakka High Court in the matter of K.C.SASHIDHARAN (supra), requires to be dissented from. The question of ordinary residence of a minor is a matter of fact to be ascertained from the evidence on record. The ordinary residence of a minor cannot be determined on the basis of presumption or there cannot be a hard and fast rule that the residence of a natural guardian or the residence of the mother of a minor should be treated as the ordinary residence of the minor.

15. In the present case also, the Court below has followed the above referred judgment in the matter of K.C.SASHIDHARAN (supra), and has fallen in error in presuming that the ordinary residence of the minor `Roshni' should be Umargaon, since her mother was residing at Umargaon or has been residing at Umargaon and that ordinarily minor ` Roshni' should be residing with her mother.

16. In the present case, it is not disputed that the minor ` Roshni ' has been residing with her father at Dadra ever since she was of a very tender age. She was not brought to Dadra by force. She accompanied her mother to Dadra. It was but natural that the applicant-mother, after the birth of minor ` Roshni' took her to her father's home at Dadra. In my view therefore, minor ` Roshni ' has been residing at Dadra as it is her natural home. Further, the minor ` Roshni ' has been residing at Dadra continuously. The residence of her father at Dadra therefore, should be treated as the ordinary residence of minor` Roshni '. Any application under Section 25 of the Act, should have been made to the District Court having jurisdiction over Dadra. Admittedly, the District Court, Valsad, has no territorial jurisdiction over Dadra.

17. For the aforesaid reasons, the Revision Application is allowed. The impugned order dated 15th June, 1992 made by the District Court, Valsad, below application Exh.14 in Guardianship Application no.13/1991 is quashed and set aside. The application be returned to the applicant for being presented to the Court of competent jurisdiction. Rule is made absolute. There shall be no orders as to costs.

(Ms.R.M.Doshit,J.)

stanley-rmd.